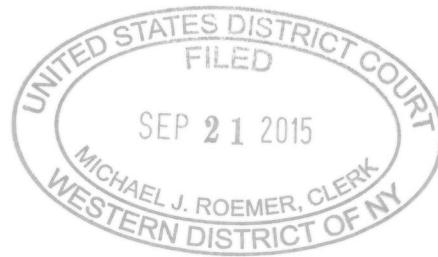


UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK



-PS/O-

RIAN T. SMITH,

Petitioner,

-v-

JAMES THOMPSON, Superintendent of Collins
Corr. Fac.,

Respondent.

DECISION and ORDER
15-CV-0712A

Petitioner Rian T. Smith, acting *pro se*, is a prisoner housed at Collins Correctional Facility. Petitioner seeks relief pursuant to 28 U.S.C. § 2254, alleging that his conviction in Niagara County Court, State of New York, was unconstitutionally obtained, as set forth more precisely in the petition. Petitioner has paid the \$5.00 filing fee.

The Court notes that petitioner previously filed a petition in this Court seeking relief under 28 U.S.C. § 2254. The petition was dismissed **without prejudice** for failure to exhaust state court remedies. See *Smith v. Graham*, 13-CV-0349A. The instant petition is deemed not to be a successive petition pursuant to 28 U.S.C. § 2244(a). See *Vasquez v. Parrott*, 318 F.3d 387, 390 (2d Cir. 2003)(internal quotation marks and citations omitted) (“where a first petition is dismissed for technical procedural reasons, such as failure to exhaust state remedies, a refiling of that petition after complying with the required formalities does not count as second or successive.”). Accordingly,

IT HEREBY IS ORDERED as follows:

1. Respondent shall file and serve an **answer** to the petition, in accordance with Rules 4 and 5 of the Rules Governing Section 2254 Cases in the United States District Courts, no later than **ninety (90) days** from entry of this Order. Further, the answer shall state whether a trial or any pre-trial or post-trial evidentiary proceeding was conducted. If any such proceeding was conducted, under the authority of Rule 4, the Court hereby directs respondent to provide to the Court the transcript of the proceeding, together with any record(s) of, and documents relating to, such proceeding, and such documents will be filed in the official record of this case.

Respondent also shall file and serve by the above date a **memorandum of law** addressing each of the issues raised in the petition and including citations of relevant supporting authority.

Within thirty (30) days of the date this order is served upon the custodian of the records, the Clerk of Court or any other official having custody of the records of the proceedings in County Court at issue now before this Court shall submit such records to respondent or the respondent's duly authorized representative.

If petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, under the authority of Rule 4, the Court hereby directs respondent to provide to the Court a copy of the briefs and record on appeal and the opinions of the appellate courts, if any, and such documents will be filed in the official record of this case.

Petitioner shall have thirty (30) days upon receipt of the answer to file a written response to the answer and memorandum of law.

Within thirty (30) days of the date this order is filed with the Clerk of Court, respondent may file a motion for a more definite statement or a motion to dismiss the petition, accompanied by appropriate exhibits which demonstrate that an answer to the petition is unnecessary. The timely filing of such motion shall extend the time for filing an answer for fourteen (14) days, but the failure of the Court to act upon the motion within that time shall not further extend the time for filing an answer.

2. The Clerk of Court shall serve a copy of the petition, together with a copy of this order, electronically via a Notice of Electronic Filing to Alyson Gill <Alyson.Gill@ag.ny.gov> and Arlene.Roces@ag.ny.gov of the Office of the Attorney General, Federal Habeas Unit.

PETITIONER MUST FORWARD A COPY OF ALL FUTURE PAPERS AND CORRESPONDENCE TO THE ATTORNEY APPEARING FOR RESPONDENT.

SO ORDERED

Dated: 09/15, 2015
Buffalo, New York


WILLIAM M. SKRETNY
Senior United States District Judge